MOHAMED SARI DATUK HJ NUAR & ANOR

v.

UNITED ENGINEERS (M) BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NOS: S-02-296-1996 & S-02-297-96]
30 MAY 2003

CIVIL PROCEDURE: *Pleadings - Striking out - Allegations of breach of contract and fraud - Particulars of fraud sufficiently condescended to in statement of claim - Whether replete with triable issues - Whether not scandalous, frivolous or vexatious - Whether summary disposal improper - Rules of the High Court 1980, O. 18 r. 19(1)*

By an agreement dated 28 October 1980, the 1st defendant sought to purchase certain machineries from the plaintiffs for RM8,092,000 and, for the purpose, took a loan of USD3,820,000 from one Armco Pacific Ltd ('Armco'). By a further agreement dated 6 June 1981 ('the CEA'), the plaintiffs extended credit of USD382,000 to the 1st defendant, to be deposited with Armco as Cash Collateral Deposit to the loan ('CCD'). It was not disputed that by the terms of the CEA, the 2nd and 3rd defendants, as directors of the 1st and 4th defendants, undertook to pay the CCD to the plaintiffs upon the full settlement of the loan with Armco.

The 1st defendant had settled the loan with Armco, but not without utilizing the CCD for the purpose. That being so, the plaintiffs sued the 1st defendant and subsequently obtained judgment against the latter for USD532,993.35. Having obtained the judgment, the plaintiffs now claimed the judgment sum from the 2nd, 3rd and 4th defendants, on the grounds that they had committed fraud and were in breaches of the CEA.

The 2nd, 3rd and 4th defendants applied to strike out the plaintiffs' actions under O. 18 r. 19(1) Rules of the High Court 1980 ('RHC'), whereupon the learned deputy registrar, upon the finding that the 2nd defendant was the only one playing an active role in the affairs of the 1st defendant, dismissed the 2nd defendant's application and allowed the 3rd and 4th defendants' applications. On appeal, the learned judge, however, disallowed all the three applications (for striking out). In these further appeals by the 2nd, 3rd and 4th defendants, a question arose as to whether the plaintiffs'

actions herein were so obviously and plainly unsustainable, that they must necessarily submit to the process of summary procedure under O. 18 r. 19(1) RHC.

Held:
Per Mohd Noor Ahmad JCA

[1] The present case demonstrates triable issues centred on the alleged breaches of the terms of the CEA and on the allegation of fraud. Clearly, the amended statement of claim discloses a reasonable cause of action, is not scandalous, frivolous or vexatious, is not otherwise an abuse of the process of the court. Likewise, the second, third and fourth defendants constitute the proper and necessary parties in the action. (p 329 g)

[2] The 2nd defendant, as a director of the 1st defendant company, played a major role in the running of the affairs of the 1st defendant and, being its alter ego, ought to be implicated in the alleged breaches. Obviously the 4th defendant too, being a company, ought to be implicated in the alleged breaches because the 2nd defendant was also its director. (p 327 h)

[3] Although the 3rd defendant had asserted that he had never actively participated in the management of the 1st and 4th defendants, or that he was not involved in their business since his resignation, such assertions could only be determined at the trial, in view of his involvement in the execution of the CEA. It followed, therefore, that the learned registrar was wrong in deciding in favour of the 3rd defendant, on the ground that his responsibility in the matter as alleged had ceased upon his resignation as the director of the 1st and 4th defendants. (pp 327 a & 328 d)

[4] The learned registrar was wrong in deciding in favour of the 4th defendant. On the facts, the plaintiffs had sufficiently condescended to particulars of the alleged fraud against both the 2nd and 4th defendants. The particulars supplied were that the 2nd and 3rd defendants, on behalf of themselves and the 4th defendants, individually or in concert, had met directly with Armco on various dates during the period 8 April - 9 December 1986. Details of the meetings were supplied by the parties during the pre-trial process, the truth or otherwise of which could be determined at the trial. (pp 327 c & 328 e-g)

[5] The law is settled that it is only in plain and obvious cases that recourse should be had to summary procedure to strike out pleadings under O. 18 r. 19(1) RHC. In proceedings to strike out pleadings, it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavits, especially when issues of credibility are involved. (pp 328 h & 329 e-f)

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Melalui perjanjian bertarikh 28 Oktober 1980, defendan pertama bersetuju membeli pelbagai mesen dari plaintif pada harga RM8,092,000 dan, untuk itu, telah memperoleh pinjaman berjumlah USD3,820,000 dari Armco Pacific Ltd ('Armco'). Melalui perjanjian tambahan bertarikh 6 Jun 1981 ('CEA'), plaintif memberi pinjaman sebanyak USD382,000 kepada defendan pertama, untuk didepositkan dengan Armco sebagai Deposit Kolateral Tunai ('CCD'). Tidak dinafikan bahawa di bawah terma CEA, defendan kedua dan ketiga, selaku pengarah-pengarah defendan-defendan pertama dan keempat, berjanji untuk membayar CCD kepada plaintif sebaik sahaja pinjaman dari Armco dijelaskan.

Defendan pertama telah melunaskan pinjamannya kepada Armco, tetapi telah menggunakan CCD untuk tujuan tersebut. Berikutnya, plaintif menyaman defendan pertama dan berjaya mendapat penghakiman untuk jumlah USD532,993.35. Setelah berjaya terhadap defendan pertama, plaintif kini menuntut jumlah penghakiman dari defendan kedua, ketiga dan keempat, atas hujah bahawa mereka telah melakukan fraud serta telah memungkiri terma CEA.

Defendan-defendan kedua, ketiga dan keempat memohon untuk mengetepikan tuntutan-tuntutan plaintif secara terus melalui permohonan di bawah A. 18 k. 19(i) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), ekoran mana, timbalan pendaftar yang bijaksana, atas dapatan bahawa hanya defendan kedua yang berperanan aktif dalam halehwal defendan pertama, menolak permohonan defendan kedua dan membenarkan permohonan defendan-defendan ketiga dan keempat. Semasa rayuan, hakim yang bijaksana, bagaimanapun, menolak ketiga-ketiga permohonan (untuk pengetepian) tersebut. Dalam rayuan-rayuan lanjut oleh defendan-defendan kedua, ketiga dan keempat di sini, isu penting yang timbul ialah sama ada tuntutan-tuntutan plaintif di sini dengan sangat jelas dan nyatanya tidak boleh dipertahankan, dan dengan itu perlu tunduk kepada pelaksanaan prosedur terus di bawah A. 18 k. 19(1) KMT.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

[1] Kes di sini memperlihatkan isu-isu yang boleh dibicarakan berkaitan tuduhan fraud serta pelanggaran terma-terma CEA. Jelas bahawa penyata tuntutan terpinda menunjukkan suatu kausa tindakan yang munasabah, tidak remeh, menyusahkan atau mengaibkan dan bukan juga suatu salah guna proses mahkamah. Begitu juga, defendan kedua, ketiga dan keempat adalah merupakan pihak-pihak yang wajar dalam tindakan.

[2] Defendan kedua, selaku pengarah syarikat defendan pertama, memain peranan besar dalam mentadbir urusan dan halehwal defendan pertama dan, sebagai alter egonya, harus dibabitkan dengan kemungkiran-kemungkiran yang dikatakan itu. Defendan keempat juga, sebagai sebuah syarikat, harus dibabitkan dengan kemungkiran-kemungkiran yang sama oleh kerana defendan kedua merupakan pengarahnya.

[3] Walaupun defendan ketiga mengatakan bahawa beliau tidak terlibat secara aktif dalam pengurusan defendan pertama dan keempat semasa menjadi pengarah di situ, ataupun tidak terlibat dalam apa-apa perniagaan syarikat-syarikat tersebut setelah bersara dari menjadi pengarah mereka, kesahihan tuntutan ini hanya boleh ditentukan pada perbicaraan, mengambilkira penglibatannya dalam CEA. Oleh yang demikian, pendaftar yang bijaksana telah silap apabila membuat keputusan yang berpihak kepada defendan ketiga, atas alasan bahawa tanggungjawabnya terhadap halperkara yang berbangkit telah luput sebaik sahaja beliau berhenti dari menjadi pengarah defendan pertama dan keempat.

[4] Pendaftar yang bijaksana silap apabila membuat keputusan yang berpihak kepada defendan keempat. Berdasarkan fakta, plaintif telah membentangkan butiran yang mencukupi berkaitan tuduhan fraud terhadap defendan kedua dan keempat. Butir-butir yang dikemukakan adalah bahawa defendan kedua dan ketiga, bagi pihak mereka sendiri serta defendan keempat, sama ada secara berasingan mahupun bersesama, telah dalam tempoh di antara 8 April hingga 9 Disember 1986 beberapa kali berjumpa dengan Armco secara terus. Butiran terperinci perjumpaan tersebut telah dibentangkan oleh pihak-pihak sewaktu proses pra-bicara, kebenaran atau kepalsuan butiran mana hanya dapat dipastikan pada pendengaran kes.

[5] Undang-undang adalah jelas bahawa prosedur pintas untuk mengetepikan pliding di bawah A. 18 k. 19(1) KMT hanya boleh dipergunakan dalam kes-kes yang terang dan jelas. Dalam prosiding untuk mengetepikan pliding, ianya tidak wajar bagi seseorang hakim untuk mencuba menyelesaikan konflik-konflik keterangan melalui afidavit, terutama bilamana ia melibatkan isu-isu kebolehpercayaan.

Rayuan-rayuan ditolak.]

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Noor Jahan Abdul Wahab v. Md Yusoff Aman Shah & Anor [1994] 2 CLJ 249 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1, O. 18 r. 19(1)

For the 2nd & 4th defendants/appellants - Peter KC Lee; M/s Lee & Assoc
For the 3rd defendant/appellant - Colin Lau; M/s Colin Lau & Co
For the plaintiff/respondent - Marina Tiu; M/s Yap, Chin & Tiu

[Appeals from High Court, Kota Kinabalu; Civil Suits No: K 202-1989 & K 202-1989]

Reported by WA Sharif

JUDGMENT

Mohd Noor Ahmad JCA:

In Civil Appeal, No. S-02-296-1996, the 2nd defendant appealed against the decision of the learned judge who dismissed his appeal to judge-in-chambers against the decision of the learned deputy registrar who dismissed his application to strike out the plaintiffs' action pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 (the Rules), and the 4th defendant appealed against the decision of the leaned judge who allowed the plaintiffs' appeal to judge-in-chambers against the decision of the learned deputy registrar who allowed the 4th defendant's application to strike out the plaintiffs' action under to O. 18 r. 19(1) of the Rules. In Civil Appeal No. S-02-297-1996, the 3rd defendant appealed against the decision of the learned judge who allowed the plaintiffs' appeal to judge-in chambers against the decision of the learned deputy registrar who allowed the 3rd defendants' application to strike out the plaintiffs' action in accordance with O. 18 r. 19(1) of the Rules. In respect of the former, we dismissed their appeals and with regard to the latter, we also dismissed his appeal.

In a summary, the facts giving rise to the claim by the plaintiffs against the defendants are:

(1) Under a contract of sale dated 28 October 1980 (the CS), the plaintiffs sold some heavy machineries to the 1st defendant for a sum of RM8,092,000. At that time, the 2nd and the 3rd defendants were the directors of both the 1st and the 4th defendants.

(2) The 1st defendant required financing for the purpose of the purchase. The plaintiffs assisted to arrange for it. In December 1980, the 1st defendant secured a loan of US$3,820,000 from Armco Pacific Ltd (the Armco), a company operating in Singapore. In relation to the said financing, the following agreements were, *inter alia*, entered into:

(i) a debenture (the debenture) made between the Armco and the 1st defendant dated 26 March 1981 whereby the Armco agreed to lend to the 1st defendant a loan of US$3,820,000 (the loan);

(ii) pursuant to the debenture, a recourse agreement was made between the Armco and the plaintiffs dated 1 June 1981 (the RA) whereby the plaintiffs agreed to reimburse the Armco for any loss sustained by it in respect of the loan to the 1st defendant up to 20% of the outstanding balance from the date of the drawdown (July 1981 or thereabout) to the expiration of 24 months thereafter (July 1983 or thereabout);

(iii) a Credit Extension Agreement made between the plaintiffs and the 1st defendant dated 6 June 1981 (the CEA) whereby the plaintiffs agreed to extend credit to the 1st defendant to pay a sum of US$382,000 from the balance of the purchase price under the CS, so that the same amount from the loan could then be used as Cash Collateral Deposit (the CCD) to be deposited with the Armco by the 1st defendant, to secure the loan pursuant to the debenture. By cl. 4 of the CEA, the balance sum of US$382,000 due from the 1st defendant to the plaintiffs under the CS would be paid to the plaintiffs from the CCD when the loan had been fully settled. This is the subject-matter of the plaintiffs' claim against the defendants in the action.

(iv) Pursuant to the CEA, an indemnity was given by the 2nd and the 3rd defendants jointly and the 4th defendant separately, dated 6 June 1981 (the indemnity) whereby they agreed to indemnify the plaintiffs for its loss, if any, arising out of or pursuant to the RA but not as a security for the CEA.

(3) The 1st defendant failed to pay punctually the interests due and the repayments of the loan to the Armco. Hence, the Armco instead used the interests or some of the interests due to the 1st defendant on the CCD to settle some of the 1st defendant's outstanding interests and part repayment of the loan. In January 1984 the Armco duly informed the plaintiffs of the use. In fact, the said interests, as instructed earlier by the 1st defendant, ought to be paid over to the plaintiffs by the Armco towards settlement of the balance of the purchase price under the CS as stipulated in the CEA. The Armco gave the 1st defendant extension of time to repay the loan in full from 1 August 1985 to 1 January 1986 for which consent of the plaintiffs was sought by the 1st defendant. The loan was fully settled by the 1st defendant in December 1986. And on 6 April 1987, the Armco informed the plaintiffs that the CCD was utilized on 9 December 1986 for the purpose.

The plaintiffs filed the writ of summons on 12 September 1989 claiming against the 1st defendant for the loss of US$532,993.35 comprising of the CCD and part of the interests accrued thereon and in the alternative, for the same amount as money had and received to the use of the plaintiffs. For this claim, the plaintiffs had already obtained a summary judgment against the 1st defendant by reason of our decision in another appeal before us (Civil Appeal No. S-02-294-1996) wherein we allowed the plaintiffs' appeal against the decision of the learned judge who allowed the 1st defendant's appeal to judge-in-chambers against the decision of the learned deputy registrar who allowed the plaintiffs' application for summary judgment under O. 14 r. 1 of the Rules, which is not the subject-matter of this judgment. The plaintiffs also claimed against the 2nd, 3rd and the 4th defendants for the loss of the same sum for breach of the respective indemnity given by them. On 10 October 1989, the defendants by summons-in-chambers applied to strike out the plaintiffs' action. On 19 December 1990, with leave of the court, the plaintiffs filed its amended statement of claim (the ASC) for breaches of the terms of the CEA and alleging fraud against the 2nd, 3rd and the 4th defendants in place of the breach of the indemnity.

The learned deputy registrar, in his written judgment in respect of the 2nd defendant found against him because, being the director of the 1st defendant, he would have a major role in running the affairs of the 1st defendant. We agree with the learned deputy registrar's findings. However, we do not agree with him when he held that the plaintiffs' claim against the 2nd defendant was not for breach of repayment of the CEA owing from the 1st defendant to the plaintiffs but in fact was a claim for defrauding the

plaintiffs, which we will explain later. In the case of the 3rd defendant, the learned deputy registrar decided in his favour on the ground that upon his resignation as the director in the 1st and the 4th defendants on 30 September 1983, his responsibility in the matter as alleged had ceased. We do not agree, in the light of our findings hereafter. With regard to the 4th defendant, the learned deputy registrar also decided in its favour by reason that the plaintiffs failed to show that it ever took part or representing itself in any of the negotiations or correspondence by any of its representatives in the alleged negotiations or correspondence, the subject-matter of the alleged fraud and that the 4th defendant would have benefitted from the said negotiations or correspondence was not sufficient to give rise to a cause of action for fraud against it. We do not agree, in view of our findings hereafter.

However, we are unable to decipher much from the written judgment of the learned judge being scanty except to note that the triable issues as found by him are related to the plaintiffs' allegation of fraud and the denial of the allegation of fraud by the 3rd defendant.

The pertinent averments of the plaintiffs are contained in paras. 7, 8, 9, 10, 11, 13, 14 and 15 of the ASC. It is clear that the plaintiffs' case is not only pitched on the allegation of fraud but also on the alleged breaches of the terms of the CEA. The plaintiffs averred that the 2nd and the 3rd defendants represented and covenanted on behalf of themselves and of the 1st and the 4th defendants that the CCD and the accrued interest thereon would be paid to the plaintiffs upon the expiry or earlier determination of the debenture and in reliance of the said representation and covenant the plaintiffs agreed and did extent credit to the 1st defendant in the sum of US$382,000 to be deposited with the Armco as the CCD out of the loan. The breaches lie in the allegation that the 1st defendant delayed payment of the instalment repayment as a result of which the interest due as from 11 October 1983 was utilized by the Armco to meet the defaulted repayments and the 1st defendant continued delaying the instalment repayment until on or around 9 December 1986 when the 1st defendant in further breach of the CEA utilized or caused to be utilized the CCD and the interests thereon to settle the loan in full with the Armco. In our view, as the 2nd defendant was a director in the 1st defendant, a company, who would have a major role in the running of the affairs of the 1st defendant and therefore, its alter ego, it seems that he would be implicated in the alleged breaches. Obviously, the 4th defendant, being a company, would also be implicated in the alleged breaches because the 2nd defendant was also its director. With regard to the 3rd defendant apparently he, being a director

of both the 1st and the 4th defendants, was to a certain extent involved in the making of the said representation and covenants and in the alleged breaches. No doubt that he had resigned as director both in the 1st and the 4th defendants on 30 September 1983 however, apparently he has still to answer for the breaches in the repayment instalments during the period immediately preceding the resignation which prompted the Armco to utilize the interest on the CCD due on 11 October 1983 to partially offset overdue outstanding payments owing by the 1st defendant and which also triggered the Armco to consider granting the 1st defendant the extension of the term of the loan for a further period of 12 months upon the 1st defendant paying up some of the arrears, the amount of which outstanding at the material time can only be determined at the trial. These facts can be gathered from the letters dated 11 January 1984 and 24 January 1984 sent by the Armco to the plaintiffs. Therefore, although the 3rd defendant asserted that when he was director in both the 1st and the 4th defendants he was never actively participating in their management and since his resignation he was not involved at all with or had any knowledge of any transaction or business of the 1st and the 4th defendants, to our mind, these assertions can only be determined at the trial, in view of his involvement in the execution of the CEA as evident from the Minutes of the Resolution of the Board of Directors of the 1st defendant dated 5 June 1981.

On the allegation of fraud, we are of the view that from the particulars supplied by the plaintiffs' solicitors to the 3rd defendant's solicitors as deposed by the 3rd defendant in his second affidavit affirmed on 14 February 1995 (see para. 4(iv)), the plaintiffs had sufficiently condescended to particulars of the alleged fraud as far as the allegations against the 2nd and the 4th defendants are concerned. The particulars supplied are that the 2nd and the 3rd defendants on behalf of themselves and the 4th defendant, individually or in concert met directly with the Armco's representatives Ms Susan Sia/Ms Lee Siok Hooi on various dates at diverse places during the period 8 April to 9 December 1986. Anyway, further detailed particulars can be sought for and supplied by between both parties during the pre-trial process, the truth or otherwise of the allegation can be determined at the trial.

The law is settled that it is only in plain and obvious cases that recourse should be had to the summary procedure to strike out pleadings under O. 18 r. 19(1) of the Rules. There are numerous authorities to support this

proposition of law. Suffice for me to cite what was said by Mohamed Dzaiddin SCJ (as his Lordship then was) in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*) [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co.* [1982] 3 Ch 274. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuch & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

In proceedings to strike out pleadings, it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, especially when issues of credibility are involved. The appropriate time for assessing the evidence, having regard to the particular circumstances of the case is at the trial when there will be a full opportunity for cross-examination and discovery, (see *Noor Jahan bte Abdul Wahab v. Md Yusoff bin Aman Shah & Anor* [1994] 2 CLJ 249, per Edgar Josesph Jr. SCJ).

To conclude, having regard to the pleadings and the conflicting affidavit evidence, we are satisfied that the case demonstrates triable issues centred on the alleged breaches of the terms of the CEA and on the allegation of fraud. Therefore, we rule that the ASC discloses a reasonable cause of action, is not scandalous, frivolous or vexatious, is not otherwise an abuse of the process of the court and that the 2nd, 3rd and the 4th defendants are the proper and necessary parties in the action.

My learned brothers Mohd. Saari Yusoff and Arifm Zakaria JJCA have read this judgment in draft and have expressed their agreement with it.